STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2014
v	No. 315683 Kent Circuit Court
CHRISTOPHER MICHAEL CAMPOS, Defendant-Appellant.	LC No. 12-002640-FC

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant, Christopher Michael Campos, was convicted by a jury on February 21, 2013, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). He was sentenced to concurrent terms of 25 to 50 years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

The victim, who was seven years old at the time of trial, alleged that defendant sexually assaulted her at various times during 2010 and 2011 while she was visiting her father at her grandmother's house in Grand Rapids, Michigan.

Defendant asserts various claims of ineffective assistance of counsel and prosecutorial misconduct on appeal.

An ineffective assistance of counsel claim is a mixed question of law and fact. The trial court's findings of fact are reviewed for clear error, while the determination of whether those facts constitute ineffective assistance of counsel is a question of law, which this Court reviews de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). When an evidentiary hearing is not held during a defendant's motion for new trial, our review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that but for this deficiency, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); *People v Pickens*, 446 Mich 298, 309, 338; 521 NW2d 797 (1994).

Defendant first claims that he was denied effective assistance when defense counsel failed to immediately object to expert witness Bonnie Skornia's testimony on redirect examination that the victim's statements during the medical examination were a "bit much" to have been instilled in the victim. Defendant argues that Skornia's testimony improperly vouched for the victim's testimony and counsel should have objected.

In a criminal sexual conduct case, an expert testifying regarding behaviors common in other abuse victims (1) may not testify that the sexual abuse occurred, (2) may not vouch for the veracity of a victim, and (3) may not testify whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). However, "(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id*. at 352-353.

Skornia improperly vouched for the truthfulness of the victim when she testified that the victim's statements, that defendant tried to put "it" in her "front no-no," but it hurt and defendant could not do it, were "a bit much" for the statements to have been instilled by her mother. *Id*. at 352. We agree that trial counsel should have immediately objected, *id*., but we conclude that reversal is not required because defendant is unable to prove that, but for this deficiency, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 US 687-688, 694; *Trakhtenberg*, 493 Mich at 51. Defense counsel objected after the prosecutor's immediate follow-up question. At that time, the trial court gave a curative instruction, making it clear that the jury was the trier of fact, not Skornia. Following the close of evidence, the trial court also instructed the jury that it was the finder of fact and that it was the jury's job to decide which witnesses to believe. In addition, the jury was instructed that it did not have to believe an expert's opinion. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, defendant is unable to prove that, but for this deficiency, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 US 687-688, 694; *Trakhtenberg*, 493 Mich at 51.

We further conclude that defense counsel was not ineffective for failing to request a mistrial after Skornia's improper comment. Skornia's testimony was cured through jury instructions and Skornia was not allowed to answer the prosecutor's clarifying question following defense counsel's objection; thus, the alleged error was not so egregious that any prejudice could not be cured. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Thus, a mistrial would not have been granted, and defense counsel is not required to argue a meritless motion for mistrial, *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010), and any failure to move for a mistrial was cured by the trial court's instruction to the jury that it was the finder of fact, not Skornia, *Abraham*, 256 Mich App at 279.

Defendant next argues that defense counsel was ineffective for failing to object to the admission of hearsay statements made by the victim to Skornia during the victim's medical examination. We disagree. The victim's statements were admissible under MRE 803(4) because

they were made for purposes of medical treatment or diagnosis and described the victim's medical history. Moreover, contrary to defendant's claim, the victim's statements were clearly trustworthy, *People v Meeboer (After Remand)*, 439 Mich 310, 322, 324-325; 484 NW2d 261 (1992), and were corroborated by other testimony, *id*. at 325-326. Because defense counsel was not required to raise a meritless objection, *Ericksen*, 288 Mich App at 201, his lack of objection to Skornia's testimony did not fall below an objective standard of reasonableness under prevailing professional norms and defendant was not denied effective assistance of counsel on this basis. *Strickland*, 446 US at 688, 694; *Trakhtenberg*, 493 Mich at 51. As a result, defendant's substantial rights also were not affected when the trial court denied his motion for new trial on this basis and the denial was not an abuse of its discretion. MCR 2.611(A)(1); *People v Powell*, 303 Mich App 271, 276-277; 842 NW2d 538 (2013).

Defendant also asserts he was denied effective assistance when defense counsel did not request the removal of juror B, who cried after the jury was chosen. This argument is without merit.

"[A]n attorney's decisions relating to the selection of jurors generally involves matters of trial strategy, which [courts] normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (citations omitted). It is presumed that jurors are competent and impartial and the party alleging the disqualification bears the burden of proving its existence. *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911); *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). This Court has previously noted:

> Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, "we cannot see the jurors or listen to their answers to voir dire questions." For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [*People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008) (citations omitted).]

Defendant was not denied the effective of assistance of counsel related to juror B. The trial court thoroughly questioned juror B about her emotions after she was seen crying in the courtroom shortly after the jury was chosen. The juror indicated her concern for the victim having to testify, regardless of whether the allegations were true or not. The juror also indicated that she did not believe sexual abuse occurred simply because it was reported and indicated that she could be fair and impartial. *Johnson*, 245 Mich App at 259. Moreover, we will not review defense counsel's decision to not challenge juror B with the benefit of hindsight because it was a strategic decision. *Id*. at 259. The trial court was able to view juror B's facial expressions, body language, and manner when answering questions, *Unger*, 278 Mich App at 258, and the trial court did not clearly err by impliedly finding that juror B's statement that she could be fair and impartial was believable, *Johnson*, 293 Mich App at 90. Moreover, the record does not disclose any further issues with the juror during the proceedings. Thus, defense counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms and there is no evidence that but for juror B's inclusion on the jury, the outcome of the trial would have been different.

Defendant also argues that he was denied effective assistance when defendant rejected a plea offer by the prosecutor at two separate hearings. In the context of a plea bargain, a defendant claiming ineffective assistance of counsel must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there was resulting prejudice. *Missouri v Frye*, 566 US ___; 132 S Ct 1399, 1405; 182 L Ed 2d 379 (2012); *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012). To establish prejudice arising out of the failure to convey or rejection of a plea bargain offer, a defendant must demonstrate a reasonable probability that he would have accepted the offer if he had been afforded effective assistance, that there was a reasonable probability that the plea would have been completed without withdrawal by the prosecutor or rejection by the court, and that there was a reasonable probability that the defendant's plea would have been to a lesser charge or subject to a lesser prison sentence. *Frye*, 566 US at ____; 132 S Ct at 1409; *Douglas*, 296 Mich App at 206-207.

In this case, (1) defendant was repeatedly informed by the trial court what the offered minimum sentence would be if defendant accepted the offer versus the 25-year minimum sentence that was mandatory if he were convicted as charged, (2) the trial court specifically informed defendant that if he rejected the plea bargain there was no guarantee that the plea bargain would be reoffered or that there would be any other plea offered, (3) defendant stated on the record that he had the opportunity to fully discuss the deal and its consequences with his attorney, and (4) there is no record evidence supporting defendant's assertion that defense counsel failed to inform him of certain facts related to the evidence needed to convict him as charged. Thus, defendant has not shown that counsel's performance fell below an objective standard of reasonableness and that but for the alleged deficiency there is a reasonable probability that he would have accepted the plea offer. *Frye*, 566 US at ___; 132 S Ct at 1405; *Douglas*, 296 Mich App at 205.

Defendant next argues that certain remarks by the prosecutor during closing argument exceeded the scope of proper comment.

Defendant preserved by objection the prosecution's statement that defense counsel knew that what defendant did was penetration. We review de novo preserved claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Even if preserved, a nonconstitutional error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Brownridge* (*On Remand*), 237 Mich App 210, 216; 602 NW2d 584 (1999). We agree that the prosecutor's single comment impermissibly attacked defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), and in effect implied that defense counsel knew that defendant was guilty of penetration, *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984), both of which are improper. However, defendant was not denied a fair trial because the jury immediately received a curative instruction, *Unger*, 278 Mich App at 235, and it is not more probable than not that the error was outcome determinative; thus, reversal is not required, *Brownridge*, 237 Mich App at 216.

Defendant also claims that he was denied a fair trial by additional comments made by the prosecutor during closing argument. We review for plain error affecting substantial rights unpreserved claims of prosecutorial misconduct. *Brown*, 294 Mich App at 382. "Reversal is

warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Error requiring reversal cannot be found if a curative instruction could have alleviated any prejudicial effect of the misconduct. *Id*. at 329-330. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citations omitted). "Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context," *Brown*, 294 Mich App at 382-383, and in light of the defendant's arguments, *Thomas*, 260 Mich App at 454.

The prosecutor's argument that defense counsel manipulated the victim's testimony during cross-examination, and would have manipulated the victim's younger brother had he testified, exceeded the bounds of proper argument because it suggested that defense counsel was intentionally attempting to mislead the jury, *Unger*, 278 Mich App at 236, by focusing on defense counsel's cross-examination technique as related to the victim, rather than the actual evidence presented at trial. Further, the argument also impermissibly shifted the focus from the evidence to defense counsel's personality and tactics. *Wise*, 134 Mich App at 101-102. However, while the prosecutor's comments exceeded the bounds of proper argument, reversal of this unpreserved issue is not required because defense counsel did not object and a curative instruction could have alleviated any prejudicial effect of the prosecutor's improper comments. *Unger*, 278 Mich App at 236. In addition, the jury was instructed after closing arguments that the lawyers' statements and arguments were not evidence and were only meant to help the jury understand the evidence and each side's legal theories. Moreover, we note that defense counsel addressed the prosecutor's arguments in his closing argument and attempted to turn them to his advantage. A defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant next argues that the prosecutor improperly questioned during rebuttal why defense counsel never asked the victim certain questions and then improperly commented that the victim would have answered those questions in a certain way. Reviewing the record and evaluating these remarks by the prosecutor in context, *Brown*, 294 Mich App at 382-383, and in light of defendant's arguments, *Thomas*, 260 Mich App at 454, it is clear that the prosecutor's comments concerning certain questions defense counsel did not ask the victim, did not exceed the bounds of proper argument. The remarks by the prosecutor were a proper response to issues raised by defense counsel in his closing argument and do not require reversal. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Moreover, the remark that the victim would have answered a question in a certain way if asked by defense counsel, did not improperly assume facts not supported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Unger*, 278 Mich App at 241. The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Unger*, 278 Mich App at 236.

Finally, defendant argues that even if reversal is not required on the basis of his individual claims, it is appropriate on the basis of the cumulative error. We disagree. The victim's testimony alone was sufficient to establish the CSC conviction involving cunnilingus, *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987), as well the CSC conviction

involving sexual penetration, MCL 750.520a(r). *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998). Thus, because there is sufficient evidence to support defendant's convictions on the basis of the victim's testimony alone, we conclude that the items we hold to be error are not so seriously prejudicial that the cumulative effect denied defendant a fair trial. *Dobek*, 274 Mich App at 106; *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Affirmed.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra